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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STUART D. KATSH, Plaintiff and Appellant, v. LAURA L. MURPHY et al., Defendants and Respondents.	B207238 (Los Angeles County Super. Ct. No. SC095825)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Judgment reversed with directions; appeal from postjudgment orders dismissed as moot.

Thomas A. Bolan for Plaintiff and Appellant.

Law Office of Mark B. Palmer and Mark B. Palmer for Defendants and Respondents.

Stuart D. Katsh (Plaintiff) seeks to recover possession of leased premises from his tenants, Laura L. Murphy and Steve Kravac (Defendants). He has served a series of notices and commenced several actions in his effort to recover possession. He commenced the present action as a limited civil action for unlawful detainer, and later filed an amended complaint reclassifying the action as an unlimited civil action. He appeals a judgment of dismissal after the sustaining of a demurrer without leave to amend, and also challenges several postjudgment orders. We conclude that the sustaining of the demurrer was proper, but Plaintiff is entitled to leave to amend the complaint to allege counts for unlawful detainer and ejectment based on the alleged violation of a use restriction in the lease.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Plaintiff owns a parcel of real property in the City of West Hollywood with two detached houses. Plaintiff resides in one house, and Defendants reside in the other. The property is subject to the City of West Hollywood Rent Stabilization Ordinance (West Hollywood Mun. Code, tit. 17, § 17.04.010 et seq.).

Sections 10 and 14 of the lease limit the use of the leased premises to residential use. Section 23 of the lease states, "Landlord's acceptance of lease payment(s) with knowledge of any default by Tenant under this Lease shall not be deemed a waiver of such default, nor shall it limit Landlord's rights with respect to that or any subsequent default."

Plaintiff served a "60-day notice to terminate tenancy for owner occupancy" in July 2006, stating that he intended to occupy the leased premises. He filed a complaint for unlawful detainer against Defendants in November 2006, alleging their failure to comply with the 60-day notice (*Stuart D. Katsh v. Laura Murphy et al.*, Super. Ct. L.A. County, No. 06U00947). Defendants moved to quash the service of summons, arguing that the 60-day notice was not approved by the City of West Hollywood as required under the Rent Stabilization Ordinance and therefore could not support an unlawful detainer action. The trial court granted the motion and entered judgment for Defendants in January 2007. The appellate division of the superior court affirmed the judgment in February 2008.

Plaintiff served a "three-day notice to deposit or quit" in March 2007, stating that the tenancy was terminated in October 2006 pursuant to the prior 60-day notice and that Defendants must pay the " 'reasonable rental value of the premises,' " in a specified amount, from that date forward. The three-day notice stated that Defendants must either deposit that amount in an account in Plaintiff's name at a reputable bank or savings and loan association pursuant to Civil Code section 1500 within three days, and give him notice of the deposit within the same three-day period, or quit the premises. He also served a "three-day notice to quit" in March 2007, stating that Defendants had violated the lease agreement and the municipal code by operating a business on the premises and must quit the premises within three days.

Plaintiff filed a combined petition for writ of mandate and complaint against the City of West Hollywood in July 2007, alleging among other things that the city's failure

to approve his 60-day notice served in July 2006 was wrongful (*Stuart D. Katsh v. City of West Hollywood*, Super. Ct. L.A. County, No. BS109826). He filed a second amended petition and complaint in February 2008, naming Defendants as real parties in interest. The trial court stayed those proceedings pending a final judgment in the first unlawful detainer action and in this action.[1]

2. *Complaint, New Three-day Notices, and First Amended Complaint*

Plaintiff filed his initial complaint in the present action in April 2007, alleging a single count for unlawful detainer based on Defendants' failure to comply with the two three-day notices served in March 2007 (*Stuart D. Katsh v. Laura Murphy et al.*, Super. Ct. L.A. County, No. 07U00318). The complaint was filed as a limited civil action. Defendants moved to quash the service of summons, arguing that the three-day notices were improper and could not support an unlawful detainer action. The trial court granted the motion in May 2007.

Plaintiff then served two new three-day notices. He served a "three-day notice to pay or quit" in May 2007, stating that the tenancy was terminated in October 2006 pursuant to the prior 60-day notice and that Defendants must pay the " 'reasonable rental value of the premises,' " in a specified amount, from that date forward. The three-day notice stated that Defendants must either deposit that amount in an account in Plaintiff's name at a reputable bank or savings and loan association pursuant to Civil Code section 1500 within three days, and give him notice of the deposit within the same

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[1] We judicially notice the petition and complaint filed in case No. BS109826 on July 6, 2007, the second amended petition and complaint filed on February 5, 2008, and the minute order filed on February 6, 2008. (Evid. Code, § 452, subd. (d).)

three-day period, or quit the premises. He also served a "three-day notice to perform or quit" in May 2007, stating that Defendants had violated the lease agreement and the municipal code by operating a business on the premises and must either comply with their contractual obligation to use the premises for residential purposes only or quit the premises within three days.

Plaintiff filed an ex parte application for leave to file a first amended complaint based on the new three-day notices and to reclassify the action as an unlimited civil case. The trial court granted the application, and Plaintiff filed a first amended complaint in October 2007.

Plaintiff alleges in his first amended complaint that his prior attempt to terminate the tenancy based on the 60-day notice was unsuccessful and that he cannot accept rent payments from Defendants without waiving the right to terminate the tenancy based on the 60-day notice.[2] He alleges that Defendants tendered numerous checks to him from December 2006 to September 2007 and deposited money directly into his bank account in an effort to force a waiver, and that he returned all of those funds. He also alleges that the checks were drawn on the account of "Murphy Management," a business entity that is not a party to the lease, and that he is not obligated to accept payment from that entity. He alleges that his refusal to accept rent payments was justified and that the only way for Defendants to extinguish their ongoing obligation to pay rent is by depositing

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[2] Plaintiff's appeal in the first unlawful detainer action was still pending at the time he filed his first amended complaint in this action.

the money in an account in his name at a reputable bank or savings and loan association pursuant to Civil Code section 1500.

Plaintiff alleges service of the "60-day notice to terminate tenancy for owner occupancy" in July 2006, the "three-day notice to deposit or quit" and "three-day notice to quit" in March 2007, and the "three-day notice to pay or quit" and "three-day notice to perform or quit" in May 2007. He alleges counts for (1) unlawful detainer; (2) quiet title, seeking a judicial determination that Defendants' tenancy was terminated in October 2006 pursuant to the 60-day notice; (3) declaratory relief, seeking a declaration that he can accept payments for rent and water service without affecting his right to terminate the tenancy pursuant to the 60-day notice, or a declaration that Defendants must either deposit the rent payments in an account in his name at a reputable bank or savings and loan association pursuant to Civil Code section 1500 or quit the premises; and (4) ejectment.

3. *Demurrer and Proposed Second Amended Complaint*

Defendants filed a demurrer to the first amended complaint on the grounds of (1) failure to allege facts sufficient to state a cause of action (Code Civ. Proc., § 430.10, subd. (e)), as to all counts; (2) another action pending (*id.*, subd. (c)), as to counts two and four; and (3) uncertainty (*id.*, subd. (f)), as to all counts.[3]

Plaintiff attempted to file a proposed second amended complaint in January 2008, but the trial court rejected the filing and stated that the complaint could not be

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[3] All further statutory references are to the Code of Civil Procedure unless stated otherwise.

filed without leave of court.[4] Plaintiff filed no written opposition to the demurrer. He filed an ex parte application the day before the hearing on the demurrer, requesting either a judicial determination that he may amend the complaint as a matter of course pursuant to section 472, leave to file a second amended complaint, or an order shortening time for notice of hearing on a motion for leave to file a second amended complaint. The trial court denied the ex parte application on January 17, 2008.

After the hearing on the demurrer on January 18, 2008, the trial court sustained the demurrer without leave to amend as to each count alleged in the first amended complaint. The court did not state whether the demurrer was sustained based on the general ground of failure to allege facts sufficient to state a cause of action or the special grounds of another action pending or uncertainty. The court entered a judgment of dismissal that same day.

4. *Postjudgment Motions and Acceptance of Past-due Rent*

Defendants filed a memorandum of costs and a motion for attorney fees, seeking to recover a total of $1,040 in costs incurred in this action and in the prior unlawful detainer action filed in November 2006 and $7,275 in attorney fees incurred in this

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[4] The appellant's appendix includes a proposed Second Amended Verified Complaint. The document is not file-stamped. It is signed and dated January 11, 2008, but is unverified. The same document was attached as an exhibit to Plaintiff's motion for relief from the judgment, filed in March 2008. Plaintiff acknowledges that the second amended complaint in the appellant's appendix is not a true copy of the second amended complaint that he attempted to file in January 2008, but is a true copy of the second amended complaint that was attached as an exhibit to the motion for relief from the judgment. Plaintiff seeks leave to amend his complaint consistent with the proposed second amended complaint in the appellant's appendix, and does not rely on the version that he attempted to file in January 2008.

action. Plaintiff opposed the motion for attorney fees and moved to tax costs. The trial court determined that Defendants were entitled to recover their attorney fees under a provision in the lease and awarded them $7,250 in fees, in an order filed on February 28, 2008. The court also advanced the hearing on Plaintiff's motion to tax costs and denied the motion.

Plaintiff moved for a new trial (§ 657) or, alternatively, to vacate the judgment (§ 663), arguing that the sustaining of the demurrer without leave to amend was error. The court denied the motion on March 11, 2008.

Plaintiff then moved for relief from the judgment. He argued that Defendants had misled the trial court into believing that this case was essentially the same case as his first unlawful detainer action filed in November 2006 and that the court should set aside the judgment under its inherent equitable powers. He also argued that his attorney's failure to file an opposition to the demurrer resulted from a mistake of law, that his attorney was surprised by the court's refusal to allow the filing of a second amended complaint without leave of court, and that the court therefore should grant him discretionary relief from the judgment under section 473, subdivision (b). He argued further that even if his attorney's neglect was inexcusable, he was entitled to mandatory relief from the judgment based on his attorney's declaration of fault.

Defendants filed an opposition to the motion for relief from the judgment. The trial court entered a minute order on April 1, 2008, stating that Plaintiff had failed to provide adequate notice of the motion under section 1005, subdivision (b), that the

hearing on the motion was advanced to that date, and that the motion was denied without prejudice to the later filing of a properly noticed motion.

Meanwhile, Plaintiff served new three-day notices in February 2008, demanding payment for past-due rent, water service, late charges, and interest on past-due rent and late charges. The notices stated that Plaintiff had refused to accept payment of rent during the pendency of the first unlawful detainer action so as to avoid waiving his right to terminate the tenancy based on the prior 60-day notice, that the first unlawful detainer action was finally concluded, and that he therefore could no longer refuse to accept rent.[5] Defendants timely tendered payment in full of the amount demanded, and Plaintiff accepted the payment. Defendants also paid rent in subsequent months, and Plaintiff accepted those payments as well.

5. *Notice of Appeal and Motion to Dismiss Appeal*

Plaintiff filed a notice of appeal from the judgment of dismissal, the orders awarding attorney fees and denying the motion to tax costs, the order denying his motion for a new trial or to vacate the judgment, and the order denying his motion for relief from the judgment.[6]

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[5] The appellate division of the superior court affirmed the sustaining of a demurrer to Plaintiff's complaint in the first unlawful detainer action in February 2008, as we have stated.

[6] Plaintiff also purported to appeal from the order sustaining the demurrer without leave to amend and the order denying his ex parte application on January 17, 2008. Those prejudgment orders are nonappealable, but may be reviewed on appeal from the judgment. (§ 906.) The denial of a new trial motion also is nonappealable, but may be reviewed on appeal from the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18.) We need not decide whether the

Defendants moved to dismiss this appeal as moot. They filed declarations stating that Plaintiff had accepted their payment of past-due rent in February 2008, and had accepted their monthly rent payments after that date as the rent became due. Defendants argued that by accepting rent payments, Plaintiff waived the right to declare a forfeiture of the lease based on either nonpayment of rent or the breach of any other lease covenant. They also argued that Plaintiff's acceptance of rent payments created a new tenancy, thereby rendering this appeal moot. We denied the motion.

CONTENTIONS

Plaintiff contends (1) his first amended complaint adequately alleges counts for unlawful detainer, declaratory relief, and ejectment;[7] (2) his proposed second amended complaint shows that any defects in the first amended complaint can be cured by amendment; (3) the sustaining of the demurrer without specifying the grounds for sustaining the demurrer was prejudicial error; (4) there was no other action pending between the parties on the same cause of action; (5) the trial court in this action had no authority to award attorney fees and costs incurred by Defendants in the prior unlawful detainer action; (6) Defendants waived any defect in the timing of the notice of motion to set aside the judgment by filing an opposition to the motion, so the denial of the

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denial of a motion to vacate a judgment under section 663 is appealable because the merits of the ruling here are encompassed within the appeal from the judgment. Accordingly, we need not separately review that ruling and will dismiss the appeal from the order as moot.

[7] Plaintiff does not meaningfully address the count for quiet title in his appellate briefs, and his proposed second amended complaint omits quiet title. We conclude that he has abandoned that count.

motion based on inadequate notice was error; and (7) Plaintiff did not waive the right to challenge the judgment and other rulings by accepting rent payments, so this appeal is not moot.[8]

DISCUSSION

1. *Standard and Scope of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) We affirm the judgment if it is correct for any reason, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable probability that the defect can be cured by amendment. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1082.) The burden is on the plaintiff to

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[8] Plaintiff's other contentions challenging the denial of his new trial motion, the rejection of his proposed second amended complaint, and the denial of leave to amend the complaint raise essentially the same issues raised by the contentions stated above, and need not be separately addressed. Our consideration of the proposed second amended complaint in reviewing the denial of leave to amend ensures that Plaintiff will have an opportunity to amend his complaint to the extent that he has shown that the complaint can be amended to state a valid cause of action.

demonstrate how the complaint can be amended to state a valid cause of action. (*Ibid.*) The plaintiff may make that showing for the first time on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

Defendants' demurrer was based on the general ground of failure to allege facts sufficient to state a cause of action (§ 430.10, subd. (e)), as to all counts, as well as the special grounds of another action pending (*id.*, subd. (c)), as to counts two and four, and uncertainty, as to all counts. The order sustaining the demurrer did not specify the grounds on which the demurrer was sustained. We must presume that the court did not rule on the special grounds, and therefore cannot affirm the judgment on those grounds and need not address them. (*Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 544 (*Briscoe*), overruled on another point in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 685, 697, fn. 9; see *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, p. 504, fn. 1.)

2. *The Failure to Specify the Grounds for Sustaining the Demurrer Was Not Prejudicial Error*

"A court sustaining a demurrer without leave to amend is required to state 'the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer.' (Code Civ. Proc., § 472d.) The grounds for a demurrer are those listed in Code of Civil Procedure section 430.10, including among others the failure to state facts sufficient to constitute a cause of action (*id.*, subd. (e)). The grounds for a demurrer differ from the reasons for sustaining a demurrer on a particular ground. A court sustaining a demurrer is required

to state the specific grounds for its decision, but is not required to state its reasons for sustaining the demurrer on the specified grounds. (*Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 275 [29 Cal.Rptr.2d 398]; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 943 [143 Cal.Rptr. 255].)" (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.)

Despite the trial court's failure to comply with section 472d, we must presume that the court sustained only the general demurrer, as we have stated, and must affirm the judgment if the complaint, for any reason, fails to state a cause of action. (*E. L. White, Inc. v. City of Huntington Beach*, *supra*, 21 Cal.3d at p. 504, fn. 2; *Fremont Indemnity*, *supra*, 148 Cal.App.4th at p. 111; *Weinstock v. Eissler* (1964) 224 Cal.App.2d 212, 224-225.) Accordingly, we reject Plaintiff's contention that the failure to specify the grounds for sustaining the demurrer was prejudicial error.

3. *Plaintiff Fails to Allege Facts Sufficient to State a Cause of Action for Unlawful Detainer Based on Nonpayment of Rent*

A tenant of real property who continues in possession and fails to cure a default in the payment of rent pursuant to the lease after service of a proper three-day notice is guilty of unlawful detainer. (§ 1161, subd. 2.) Section 1161, subdivision 2 authorizes an unlawful detainer action based on a "default in the payment of rent, pursuant to the lease or agreement under which the property is held . . . ."

A plaintiff alleging unlawful detainer based on the nonpayment of rent must allege a default in the payment of rent under the lease or other agreement and service of a three-day notice in compliance with section 1161, subdivision 2. Such a three-day

notice must require the tenant to timely deliver either payment of rent or possession of the property. (*Ibid.*; *Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27.) The notice must state the amount due and "[(1)] the name, telephone number, and address of the person to whom the rent payment shall be made, . . . or [(2)] the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the institution (provided that the institution is located within five miles of the rental property), or [(3)] if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure . . . . " (§ 1161, subd. 2.)

Plaintiff alleges in his first amended complaint that he returned to Defendants several rent checks that they tendered beginning in December 2006, and promptly returned money that they had deposited in his bank account without his prior agreement. He alleges that he served a "three-day notice to pay or quit" in May 2007, that two days later Defendants tendered a check for the full amount stated in the notice, and that he returned the check to them. He alleges that he refused to accept any rent payment after October 2006 because he wished to avoid waiving his purported right to terminate the tenancy pursuant to the 60-day notice served in July 2006. Plaintiff argues that the only way for him to accept payment without a waiver is if the payment is made pursuant to Civil Code section 1500, and that he therefore is justified in demanding payment by

deposit into an account in his name at an unnamed bank or savings and loan association.[9]

The facts alleged in the first amended complaint show that Defendants did not fail to pay rent pursuant to the terms of the lease, as required to establish an unlawful detainer based on nonpayment of rent under section 1161, subdivision 2. Rather, Defendants tendered payments of rent due under the lease, but plaintiff refused to accept those payments and instead insisted that the tenancy was terminated and that Defendants must pay the " 'reasonable rental value of the premises' " (in lieu of "rent") by depositing funds in an unnamed financial institution pursuant to Civil Code section 1500. Thus, the facts alleged in the first amended complaint do not show a default in the payment of rent under the lease, but only the failure to comply with a demand for payment in the manner stated in Civil Code section 1500. Neither section 1161 nor any other statute or legal authority provides that the failure to deposit money in the manner stated in Civil Code section 1500 pursuant to a demand constitutes an unlawful detainer.

Moreover, a three-day notice must demand that payment of rent be delivered to a person specified in the notice, deposited in a specified account at a financial institution identified in the notice, or transferred electronically if the parties have established a procedure for the electronic transfer of funds. (§ 1161, subd. 2.) A three-day notice

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[9] Civil Code section 1500 states: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor."

under section 1161, subdivision 2 cannot demand payment by any other method. (See *WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 526 [stating that a landlord invoking the summary procedures of unlawful detainer must strictly comply with the statutory notice requirements]; *Baugh v. Consumers Associates, Ltd.* (1966) 241 Cal.App.2d 672, 674 ["it is essential that a party seeking the remedy bring himself clearly within the statute"].) A complaint for unlawful detainer based on a defective notice fails to state a valid cause of action. (*Baugh, supra*, at p. 675.) We conclude that the sustaining of the demurrer to the count for unlawful detainer was proper to the extent that the count is based on the nonpayment of rent.

Plaintiff's proposed second amended complaint would not cure these deficiencies because it alleges the same operative facts and is based on the same defective "three-day notice to pay or quit." Accordingly, Plaintiff is not entitled to leave to amend his complaint to allege a count for unlawful detainer based on the nonpayment of rent or failure to deposit.

4. *Plaintiff Is Entitled to Leave to Amend the Complaint to Allege an Unlawful Detainer Based on Failure to Comply with the Use Restriction*

A tenant of real property who continues in possession and fails to perform a lease condition or covenant, other than a covenant for the payment of rent, after service of a proper three-day notice is guilty of unlawful detainer. (§ 1161, subd. 3.) Section 1161, subdivision 3 authorizes an unlawful detainer action based on "a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one

for the payment of rent . . . . " A plaintiff alleging an unlawful detainer on this basis must allege the failure to perform a condition or covenant under the lease or agreement and service of a three-day notice in compliance with section 1161, subdivision 3.

Defendants do not challenge either the allegations of failure to perform or the "three-day notice to perform or quit" served in May 2007. Instead, Defendants argued in support of their demurrer that the count for unlawful detainer in the first amended complaint was based on the "three-day notice to quit" served in March 2007, rather than the "three-day notice to perform or quit" served in May 2007. They argued that for the alleged breach of a use restriction, a proper notice under section 1161, subdivision 3 must be to "perform or quit," in the alternative, and that an unconditional "notice to quit" was improper. Defendants repeat this argument on appeal. Defendants also argue that the "three-day notice to perform or quit" served in May 2007 cannot support an unlawful detainer count because the notice was served after Plaintiff filed his original complaint in this action in April 2007. They argue further that by accepting payment for past-due rent in March 2008, Plaintiff waived any right to terminate the lease based on the alleged breach, renewed the lease, and rendered this appeal moot. We are not persuaded.

The first amended complaint is much longer than necessary. It contains a great deal of repetition and surplusage, both in its allegations and in its 19 exhibits. Plaintiff alleges service of the 60-day notice in July 2006, the "three-day notice to deposit or quit" and "three-day notice to quit" in March 2007, and the "three-day notice to pay or quit" and "three-day notice to perform or quit" in May 2007. He incorporates those

allegations by reference in the unlawful detainer count, but fails to clearly state which notice supports his unlawful detainer count in this action. His allegation in the unlawful detainer count that he "is entitled to terminate defendants' tenancy in an unlawful detainer action pursuant to an unconditional three-day notice to quit" suggests that the count is based on the "three-day notice to quit" served in March 2007. But his prior allegation, incorporated by reference in the unlawful detainer count, that he served a "three-day notice to perform or quit" in May 2007 pursuant to the trial court's suggestion that he "could state a cause of action for unlawful detainer if his Notice to Quit was stated in the alternative as a 'Three Day Notice to Perform or Quit' " suggests that the unlawful detainer count is based on the "three-day notice to perform or quit" served in May 2007. In any event, Plaintiff does not allege in the first amended complaint that Defendants failed to timely perform pursuant to the three-day notice by discontinuing their alleged commercial use of the property. The failure to timely perform or quit pursuant to the notice is an essential allegation (§ 1161, subd. 3), the absence of which renders the count subject to demurrer.

Plaintiff's proposed second amended complaint more clearly alleges an unlawful detainer based on failure to comply with the "three-day notice to perform or quit" served in May 2007, and alleges that Defendants failed to timely perform or quit as demanded in the notice. Contrary to Defendants' argument, the fact that the "three-day notice to perform or quit" served in May 2007 was served after Plaintiff filed his initial complaint in this action in April 2007 does not render the proposed second amended complaint premature.

Defendants have failed to establish a waiver. A waiver is the intentional relinquishment of a known right with knowledge of the facts. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) The determination of a waiver ordinarily is a question of fact that depends solely on the intent of the purportedly waiving party. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196; *Waller*, *supra*, at pp. 31-32.) A waiver must be established by clear and convincing evidence. (*Waller*, *supra*, at p. 31.) A waiver may be express or implied from conduct that indicates an intent to relinquish the right. (*Ibid.*) The landlord's acceptance of rent accruing after a breach with knowledge of the breach ordinarily implies a waiver of the right to declare a lease forfeiture based on the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440-441; *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 533.) An express provision in the lease that the landlord's acceptance of rent with knowledge of a breach shall not be deemed a waiver of the landlord's rights with respect to the breach, however, ordinarily would negate such an inference. (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 341-342.) Other acts by the landlord showing an intent to enforce his or her rights also can negate such an inference, including the prior filing (i.e., before accepting the payment of rent) and continued prosecution of an action for unlawful detainer based on the breach. (*Myers v. Herskowitz* (1917) 33 Cal.App. 581, 584-585.)

The lease provision here stating that the landlord's acceptance of rent payments with knowledge of the tenant's default "shall not be deemed a waiver of such default, nor shall it limit Landlord's rights with respect to that or any subsequent default"

together with Plaintiff's service of three-day notices declaring a forfeiture of the lease based on the alleged breach of the use restriction and his continued prosecution of this action for unlawful detainer strongly indicate that he never intended to waive his rights. We cannot conclude as a matter of law based on the facts alleged in the complaint that Plaintiff waived his rights.

We also reject Defendants' argument that Plaintiff's acceptance of rent payments after service of the three-day notices resulted in a renewal of the lease pursuant to Civil Code section 1945. Section 1945 establishes a presumption of a renewal if a tenant remains in possession and the landlord accepts payment of rent "after the expiration of the hiring." (*Ibid.*) The presumption is rebuttable. (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 820; *Miller v. Stults* (1956) 143 Cal.App.2d 592, 598.) Whether the parties actually intended to renew the lease is a question of fact. (*Aviel*, *supra*, at pp. 820-821; *Miller*, *supra*, at p. 599; see Evid. Code, § 600, subd. (a).) The facts alleged in the complaint do not establish as a matter of law that the parties intended to renew the lease. To the contrary, the "no waiver" provision in the lease and Plaintiff's continued efforts to terminate the lease and evict Defendants tend to show that Plaintiff did not intend to renew the lease.

Accordingly, we conclude that the sustaining of the demurrer to the count for unlawful detainer was proper, but Plaintiff is entitled to leave to amend the complaint to allege an unlawful detainer based on the alleged violation of the use restriction, as stated in the "three-day notice to perform or quit" served in May 2007.

5. *The Declaratory Relief Count Is Moot*

A party may obtain declaratory relief concerning the parties' rights and duties with respect to a written instrument or property if there is an actual controversy as to the parties' rights and duties. (§ 1060.) Plaintiff alleges in his count for declaratory relief that he cannot accept payment of rent from Defendants without waiving his right to terminate the tenancy based on the 60-day notice served in July 2006. He alleges that Defendants have tendered rent payments in an effort to create a waiver and that they have refused to deposit money in the manner stated in Civil Code section 1500, as demanded. He alleges that this constitutes an actual controversy and seeks a judicial declaration that he can accept payments for rent and water service without affecting his right to terminate the tenancy based on the 60-day notice. Alternatively, he seeks a declaration that Defendants must either deposit payment in an account in his name at a reputable bank or savings and loan association pursuant to Civil Code section 1500 or quit the premises. Plaintiff's proposed second amended complaint alleges the same operative facts and seeks the same relief.

We conclude that there is no actual controversy because events occurring after the sustaining of the demurrer in January 2008 have rendered this count moot. The appellate division of the superior court in the first unlawful detainer action conclusively determined that Plaintiff cannot terminate the tenancy based on the 60-day notice. Plaintiff therefore no longer has any reason to refuse payment or insist on a deposit pursuant to Civil Code section 1500 in order to avoid waiving his purported right to terminate based on the 60-day notice, and he has accepted payments for rent and water

service since February 2008. It is apparent that Plaintiff no longer seeks the requested declarations. Because we do not reach the merits of the trial court's ruling on this count, the appropriate disposition is to reverse the judgment with directions to dismiss the count for declaratory relief. (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 229.)

6. *Plaintiff Is Entitled to Leave to Amend the Complaint to Allege Ejectment*

Ejectment is a common law count by which an owner of real property with the right of possession may recover possession of the property. (*Payne & Dewey v. Treadwell* (1860) 16 Cal. 220, 243 (*Payne*).) Plaintiff alleges in his count for ejectment that Defendants' tenancy was terminated in October 2006 based on the 60-day notice, that Defendants remained in possession after that date, that they failed to pay for either rent or water service after that date, and that they refused to comply with his "three-day notice to deposit or quit" served in March 2007 or his "three-day notice to pay or quit" served in May 2007."

Defendants argued in support of their demurrer that the ejectment count in the first amended complaint was based on the 60-day notice served in July 2006. They argued that the notice did not comply with the requirements of the Rent Stabilization Ordinance and therefore could not support a valid cause of action for ejectment. We conclude that the ejectment count, reasonably construed, is not based on only the 60-day notice. Rather, the count is also based on the "three-day notice to deposit or quit" served in March 2007, the "three-day notice to pay or quit" served in May 2007, Defendants' alleged failure to pay rent since October 2006, and their failure to deposit funds as demanded. The appellate division of the superior court conclusively

determined that the 60-day notice was improper and could not support an unlawful detainer action, and we have concluded that the three-day notices based on the purported duty to deposit were improper and that there was no default in the payment of rent under the lease. Accordingly, we conclude that none of the alleged grounds for ejectment is a proper basis for termination of the tenancy or can establish Plaintiff's right of possession.

The only essential elements of an ejectment cause of action are the plaintiff's ownership of the property, or other basis for the right of possession, and the defendant's withholding of possession. (*Payne*, *supra*, 16 Cal. at pp. 243-244.) The right of possession ordinarily is inferred from the plaintiff's ownership, and the plaintiff need not allege that the defendant's withholding of possession is wrongful. (*Id.* at pp. 244, 247) If, however, the plaintiff alleges facts negating the plaintiff's right of possession, the complaint is subject to demurrer. (*Castro v. Richardson* (1861) 18 Cal. 478, 479 [complaint for ejectment alleged facts negating the plaintiff's claim of ownership]; *Shusett, Inc. v. Home Sav. & Loan Assn.* (1964) 231 Cal.App.2d 146, 150 [same].) Plaintiff alleges that Defendants are tenants and that he attempted to terminate their tenancy based on the specified notices, which we have determined to be defective. In light of those allegations, and absent allegations sufficient to establish a termination of the tenancy, we conclude that the sustaining of the demurrer to the ejectment count was proper.

Plaintiff alleges in his proposed second amended complaint that he is entitled to possession of the property based on Defendants' alleged failure to pay for rent or water

service since November 2006, their failure to deposit money in the manner stated in Civil Code section 1500, and their alleged commercial use of the leased premises in violation of the use restriction in the lease. Only the last of these allegations alleges a proper basis to terminate the tenancy and establish the right of possession, as we have stated.

Accordingly, we conclude that the sustaining of the demurrer to the ejectment count was proper, but Plaintiff is entitled to leave to amend the complaint to allege a count for ejectment based on violation of the use restriction in the lease.[10]

7. *Plaintiff's Appeal from the Order Denying his Motion for Relief from the Judgment Is Moot*

Plaintiff also challenges the denial of his motion for relief from the judgment, in which he sought to set aside the judgment under the court's inherent equitable powers or under section 473, subdivision (b). He argued that the court was misled by Defendants' mischaracterization of the first amended complaint and that the sustaining of the demurrer resulted from his failure to timely oppose the demurrer. Our independent review of the allegations in the complaint, consideration of the proposed amendments, and reversal of the judgment with directions to allow leave to amend the complaint ensures that Plaintiff will have an opportunity to amend his complaint to the extent he has shown that the complaint can be amended to state a valid cause of action. We

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[10] We reject Defendants' argument that the ejectment count is moot because Plaintiff waived the right to terminate the lease by accepting rent payments, for the same reasons stated above with respect to the count for unlawful detainer.

therefore conclude that the appeal from the order denying Plaintiff's motion for relief from the judgment is moot.

8. *Plaintiff's Appeal as to the Award of Attorney Fees and Costs Is Moot*

Our reversal of the judgment with directions to grant leave to amend two counts means that there is no prevailing party (see § 1032, subd. (a)(4)) and no basis, at this time, for an award of costs incurred in the trial court, including attorney fees as costs. A reversal of the judgment automatically vacates an award of costs incidental to the judgment. (*Evans v. Southern Pacific Transportation Co.* (1989) 213 Cal.App.3d 1378, 1388.) Plaintiff's appeal as to the award of attorney fees and costs therefore is moot.

DISPOSITION

The judgment is reversed with directions to the trial court to vacate its order sustaining the general demurrer to each of the four counts alleged in the first amended complaint without leave to amend, and enter a new order (1) sustaining the general demurrer to the count for unlawful detainer with leave to amend the complaint to allege an unlawful detainer based on failure to comply with the use restriction; (2) sustaining the general demurrer to the count for quiet title without leave to amend; (3) dismissing the count for declaratory relief as moot; and (4) sustaining the general demurrer to the count for ejectment with leave to amend the complaint to allege Plaintiff's right to

terminate the tenancy and recover possession of the property based on the alleged violation of the use restriction. The appeal as to the denial of Plaintiff's motion for relief from the judgment, the denial of his motion to vacate the judgment, and the award of attorney fees and costs is dismissed as moot. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.